



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
ALAN G. LANCETo: Ray Swenson  
John Schaffer  
Doug Jorgenson  
Dave Wilkins

From: Katie

## FACSIMILE COVER SHEET

To	Fax Number	Phone/Location
Mark Frei	208 526 - 0542	526 - 5665

From: Steve Allred c/o  
Darrell B. Early Date: 11/28/01If you do not receive entire transmission, call 373-0494  
at (208) 373-0494.

Number of pages (including cover sheet): 5

Message: Per Steve Allred's request in forwarding  
the enclosed letter. EPA Region 10 has participated  
in the drafting of this letter but was unavailable to sign  
the letter today

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STATE OF IDAHO  
DEPARTMENT OF  
ENVIRONMENTAL QUALITY

1410 North Hilton • Boise, Idaho 83706-1255 • (208) 373-0502

Dirk Kempthorne, Governor  
C. Stephen Allred, Director

November 28, 2001

Mr. Mark Frei  
Acting Manager  
Idaho Operations Office  
U.S. Department of Energy  
850 Energy Drive  
Idaho Falls, Idaho 83401-1563

Subject: Pit 9 Dispute Resolution – Proposal for settlement

Dear Mr. Frei:

This letter responds to your November 26, 2001 letter confirming revised deadlines for the Pit 9 Interim Action Demonstration Project and sets forth a framework for resolution of the remaining issues in this dispute that is acceptable to DEQ and EPA. Accordingly, this letter can be considered DEQ and EPA's joint settlement offer.<sup>1</sup>

First, DEQ and EPA concur with the deadlines identified in your November 26, 2001 letter with the following caveat. DOE has characterized some of these dates as "notification" dates. Because the purpose of the new deadlines is to assure that physical work and activities are occurring at the site, they should be expressed as affirmative physical actions rather than "notifications." There should be no misunderstanding that "substantial continuous onsite physical" construction is to begin by November 2002 and waste retrieval and packaging operations are to be completed by October 2004. DOE is free to notify DEQ and EPA of the commencement and completion of the respective item in whatever manner is appropriate. With this understanding we are in agreement with the enforceable dates proposed in your November 26 letter related to the seven Phase II deadlines. The final dispute resolution agreement will reflect language making this understanding clear and establish these dates as enforceable deadlines under the FFA/CO.

With respect to the Waste Area Group 7 (WAG 7) Draft Remedial Investigation/ Feasibility Study (RI/FS) enforceable deadline of March 31, 2002 we are not in agreement with the approach described in your October 30 letter. Your proposal deviates

<sup>1</sup> This letter is written for the purpose of facilitating the resolution of potential litigation and is, accordingly, subject to the provisions Rule 408 of the Idaho Rules of Evidence and the Federal Rules of Evidence.

Mr. Mark Frei  
November 28, 2001  
Page 2

from the approach taken in both 1993 and 1997 by disconnecting the WAG 7 RI/FS from the results of Pit 9. We see little value in our review of a Draft Feasibility Study that does not incorporate a retrieval alternative with information and results from the Pit 9 project. However, we do agree that submittal of the Draft Remedial Investigation (RI) and Baseline Risk Assessment, which was required to be submitted to DEQ and EPA by October 31, 2001, is still necessary and can be completed during time frames for the revised Phase II actions. DOE's election to not deliver these documents as scheduled, necessitates that DEQ and EPA establish enforceable dates for their delivery in the future. Accordingly, these secondary documents shall be submitted by March 31, 2002. The language of the Agreement to Resolve Disputes shall include language making this secondary document subject to stipulated penalties pursuant to paragraph 11.1 of the FFA/CO. Having thus assured their timely delivery, the agencies' review of this secondary document will identify data gaps and other deficiencies that need to be addressed in the Draft RI/FS to appropriately establish remedial action objectives and identify remedial action alternatives.

With respect to the Draft RI/FS, the final dispute resolution document will establish a revised enforceable deadline of April 2005. If DOE believes an earlier date can be met that allows time for DOE to incorporate findings from the completed Pit 9 retrieval effort, DOE is free to propose this alternative date. Obviously, this new deadline for the Draft RI/FS will require revision of the deadline for the Draft Proposed Plan and the Draft ROD for WAG 7. DEQ and EPA propose that the deadlines for these documents be revised to September 2005 and February 2006 respectively.

A further concern to DEQ and EPA is DOE's commitment to undertake Stage III of Pit 9. DEQ and EPA continue to see value in the Stage III process. Although we may be inclined to ultimately roll Stage III into the OU 7-13/14 Record of Decision, we believe that Stage III with accompanying enforceable milestones should remain a part of the Pit 9 Interim Action Record of Decision until the final ROD for WAG 7 is issued. Furthermore, we believe that a new enforceable deadline for the submittal of a Pit 9 Stage III 10% design, which would be considered a primary document under the Federal Facility Agreement and Consent Order (FFA/CO) needs to be established. Accordingly, DEQ and EPA propose an enforceable deadline of January 2005 for the Stage III 10% design. The timing of this submittal is linked to completion of the Stage II effort but is prior to the submittal of the Draft RI/FS. With the establishment of this document as a new enforceable deadline, DEQ and EPA believe that new enforceable deadlines for Stage III should also be established similar to those for Stage II, as a contingency should the Agencies be unable to reach agreement on the final WAG 7 Record of Decision. In this regard DEQ and EPA propose Completion of Remedial Design and Commencement of Construction of Stage III by January 2007 and Commencement of Stage III operation by June 2008. These revised dates would replace the current enforceable deadlines for the 90% Design and the Stage III Remedial Action Work Plan.<sup>2</sup>

<sup>2</sup> The current enforceable dates for these documents are April 2003 and September 2003, respectively.

Mr. Mark Frei  
November 28, 2001  
Page 3

In addition to the establishment of the new schedules reflected above, DEQ and EPA propose the following terms of settlement. These terms are designed to assure the State and EPA that DOE will meet its commitment to complete Stage II of Pit 9 within the schedule. These terms will also address the fact that DOE's initial request for extensions, which resulted in this dispute, violated the deadline requirements set forth in the FFA/CO and the 1997 Agreement to Resolve Disputes.

First, a stipulated penalty of \$825,000.00 could potentially be assessed based upon the missed Pit 9 deadlines for submittal of the Stage II Remedial Action Report.<sup>3</sup> For purposes of resolving this dispute, however, DOE would agree to the payment of a penalty pursuant to paragraph 11.1 of the FFA/CO in the amount of \$575,000.00.<sup>4</sup> Twenty-five percent (25%) of said penalty would be payable to the United States and seventy-five percent (75%) payable to the State of Idaho to be used to fund a SEP as prescribed by the State.

Second DOE would agree to establish a Pit 9 Project Trust Fund<sup>5</sup> in the amount of Three Million, Five Hundred Thousand dollars (\$3,500,000.00). This trust type fund would be established at a mutually agreed upon location. DOE, EPA and DEQ would be co-trustees of this fund. All interest on trust fund monies shall be paid to State of Idaho, and would fund Supplemental Environmental Projects as agreed to by the co-trustees. DOE would agree to forfeit specified amounts of the Trust fund monies if specified deadlines<sup>6</sup> for the revised Stage II of Pit 9 are missed and to pay further penalties pursuant to FFA/CO paragraph 11.1 should the forfeited sum be less than what would have been paid in penalties under that provision. Forfeited Trust Fund sums (if any) would be paid to the State of Idaho and would be used to fund SEPs as agreed to by the co-trustees. In the event all deadlines are met, trust fund monies would be returned to DOE without interest.

Third, DOE would agree to negotiate and establish specific performance based incentives with its M&O contractor for meeting the Pit 9 deadlines. The annual performance-based incentive shall be no less than 10% of the total available fee.

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<sup>3</sup> Based upon approximately 83 weeks of delay as reflected in the revised schedule for completion of waste retrieval and packaging as agreed to above.

<sup>4</sup> Based upon approximately 58 weeks of delay which reflects a reduction for the 6 month margin of safety.

<sup>5</sup> DEQ and EPA are aware that DOE has concerns about establishing an outside trust fund. DEQ counsel has requested a legal memorandum from DOE counsel outlining the statutory or regulatory hurdles to establishment of this type of arrangement. The agencies are amenable to an alternative proposal if it appears that these statutory or regulatory hurdles are insurmountable so long as it provides a visible, segregated, funding commitment and forfeiture provisions.

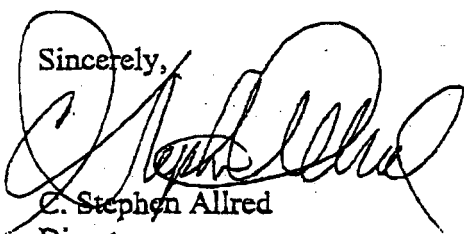
<sup>6</sup> All seven of the agreed upon deadlines for Phase II will be enforceable and subject to stipulated penalties pursuant to paragraph 11.1 of the FFA/CO. Certain of the deadlines will also be linked to forfeiture for the Trust Fund monies as an alternative remedy.

Mr. Mark Frei  
November 28, 2001  
Page 4

Fourth, DOE would agree to henceforth identify discrete Pit 9 funding in its annual budget requests to Congress and shall not place other INEEL cleanup projects at risk in order to provide funding for Pit 9. DOE would further agree to separately identify funds associated with any litigation related to Pit 9 and not use monies dedicated to Pit 9 clean up for the payment of litigation related expenses. DOE would agree to provide DEQ and EPA with copies of documents reflecting DOE's separate budget requests related to the Pit 9 project. In addition DOE would agree to report to DEQ and EPA its annual expenditures on the Pit 9 project.

We believe that agreement to these terms or mechanisms similar to these terms will provide the appropriate framework to assure successful completion of both Stage II and the remaining subsurface disposal area. In order to allow sufficient time for you to consider these terms and to provide for the drafting of an Agreement to Resolve Disputes, EPA and DEQ by this letter agree to an extension of the current deadline for elevation to December 15, 2001. We look forward to corresponding with you to reach resolution of these matters.

Sincerely,



C. Stephen Allred  
Director

Sincerely,

John Iani  
Administrator

cc: Orville Green  
Ann Williamson  
Pete Dirkmaat